

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9265 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

HARESH KARSAN BHIL

Versus

COMMISSIONER

Appearance:

MS DR KACHHAVAH for Petitioner

MR KT DAVE ASSTT GOVT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 15/02/2000

ORAL JUDGEMENT

#. Heard Ms.D.R.Kachhavah, learned advocate for the petitioner and learned AGP Mr.K.T.Dave for respondents No : 1, 2 & 3.

#. The detention order dated 6-5-1999 passed by

respondent No.1 - The Commissioner of Police, Ahmedabad City against the petitioner in exercise of powers conferred under Section 3(1) of Gujarat Prevention of Anti Social Activities Act, 1985 ('PASA' for short) is challenged in the present proceedings under Article 226 of the Constitution.

#. The grounds of detention served and supplied to the detenu under Section 9(1) of the PASA, a copy of which is produced at Annexure-B interalia indicate that three prohibition cases dated 5-2-99, 21-2-99, and 20-3-99 were registered at Nashabandhi (North Zone) Police station against the petitioner and forth prohibition case is registered vide C.R. No : 5288/99 at Sardarnagar Police Station on 6-4-99. That in each case, the country made liquor has been seized and all the cases are pending for further investigation.

#. The grounds of detention further indicate that two witnesses on assurance of their anonymity have given statement dated 4-5-99 and 5-5-1999 respectively regarding the bootlegging activities of the petitioner and have narrated incidents alleged to have occurred on 20-4-99 and 15-4-99 respectively. That on the basis of the said material, the respondent No.1 as the detaining authority has come to the conclusion that the petitioner / detenu is a bootlegger within the meaning of Section 2(b) of PASA. That enforcement of general provisions of law are insufficient to prevent the petitioner forthwith from continuing his anti social activities, and as such, the detention order is necessary and hence, the impugned order is passed.

#. The petitioner has challenged the impugned order on numerous grounds. It is contended on behalf of the petitioner that the impugned order suffers from the vice of non application of mind inasmuch as, at the time when the impugned order was passed, the petitioner was in judicial custody as the petitioner was arrested in respect to first three criminal cases as stated hereinabove on 4-5-99 and in the forth case on 5-5-99. It is also contended vide para 10 A of the petition that the authorities have failed to consider the aspect of opposing the bail or claiming cancellation of bail, if granted, under Section 437 (5) of CrPC.

#. Learned AGP Mr.K.T.Dave has vehemently opposed the contention contending that the last three paragraphs of the grounds of detention sufficiently disclose

application of mind. Relying on the observations made by the Supreme Court in the matter of SANJEEVKUMAR AGRWAL VS. UNION OF INDIA reported vide AIR 1990 SC 1202 and especially in para 12, Mr.Dave urged that merely because the petitioner was in judicial custody on the date of passing of the order, it cannot invalidate the detention order passed by the competent authority. Mr.Dave, learned AGP has also urged that the detention order could not be said to be invalid merely because the bail application could have been opposed, if moved by the detenu, and if the detenu is enlarged on bail, the same could be questioned in the higher court for cancellation.

#. It is true that in the matter of SANJEEV KUMAR AGRAWAL (SUPRA), the Hon'ble Supreme Court having considered the decision of Constitution Bench rendered in the matter of RAMESHWAR SHAW VS. DISTRICT MAGISTRATE BURDWAN AND ANOTHER reported vide AIR 1964 SC 334 observed in para-12 as under :-

"Whether the detention of the said person would be necessary after he is released from jail and if the authority is bonafide satisfied that such decision is necessary, he can make valid order of detention a few days before the person is likely to be released. The antecedent history and past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after he is released is necessary."

#. It is necessary to note that the Constitution Bench in the said case of RAMESHWAR SHAW (SUPRA) has also observed further in the same paragraph as under :

"There is no indication that this factor or the question that the said detenu might be released or that there was such possibility of his release was taken into consideration by the detaining authority properly and as a result, before service of the order, a bald statement is merely and Ipse dixit of the officer. If there were cogent material for thinking that the detenu might be released then it should have been made apparent."

#. That in the matter of SANJEEV KUMAR (Supra) the Bench has also observed in para 11 as under ;

"It could be thus be seen that no decision of this Court has gone to the extent of holding that no order of detention can validly be passed against a person, who is in custody under any circumstances. That therefore, the facts and circumstances of each case, have to be taken into consideration in the context of considering the order of detention passed in the case of detenu, who is already in a jail "

##. On the basis of the abovestated proposition of law settled by the Hon'ble Supreme Court, it is necessary to examine in the instant case that as to whether the detaining authority has applied his mind to the facts and circumstances involved in the matter before passing the impugned order. That as alleged on behalf of the respondents, the detaining authority was aware of the fact that the proposed detenu was in judicial custody and he has assigned the reasons that by passage of time, he is likely to be released on bail and having got himself released on bail, he is likely to indulge into anti social activities. That no facts are stated on which the subjective satisfaction is reached by the detaining authority to the effect that the detenu if released on bail, is likely to indulge into prejudicial activities. According to Mr.Dave, learned AGP, it could be presumed that the petitioner was involved in prohibition cases registered vide C.R. No : 65/99, 109/99, 156/99 and 5288/99 respectively on 5-2-99, 21-2-99, 20-3-99 and 6-4-99 respectively and as such, the detaining authority is justified in coming to the conclusion that looking to the antecedent history of the petitioner, the petitioner is likely to indulge into bootlegging activities if released on bail.

##. That as per the proposition of law laid down by the Supreme Court and stated hereinabove, the fact should reflect from the grounds of detention that the detaining authority has considered the possibility that the detenu is likely to be released on bail and having considered the antecedent history and other such activities of the detenu, he has come to the conclusion that after the released on bail, the detenu is likely to indulge into bootlegging activities and that taking of action to claim cancellation of bail would be of no avail. That to prevent detenu from indulging into prejudicial activities forthwith, detention order is necessary.

11.1 In the instant case, the perusal of the last three paragraphs of the grounds of detention

(Annexure-B), it appears that the detaining authority has mentioned a fact to the effect that vide earlier orders dated 23-1-1995 and dated 17-6-98, the present petitioner was detained under PASA. However, it is not stated in the said paragraphs that whether the detention order dated 17-6-98 was revoked or quashed and set aside or that the detenu had served out the detention period and soon thereafter, has started indulging into prejudicial activities like bootlegging. In the absence of any such facts stated therein, there is no material to infer or support the conclusion drawn that soon thereafter the detenu has started indulging into prejudicial activities of bootlegging. Furthermore, as submitted by learned AGP, prohibition cases vide C.R. No : 65/99 dated 5-2-99, C.R. No : 10/99 dated 21-2-99, C.R. No : 156/99 dated 20-3-99 and C.R. No : 5288/99 dated 6-4-99 were registered involving the petitioner / detenu into bootlegging activities but the detenu was not arrested on the date when each of the case was registered. It appears from the record that in respect to first three cases, the detenu was arrested on 4-5-99 and in respect to forth case was arrested on 5-5-99. Thus, it is not the case against the detenu that the detenu having got himself released on bail in each case, had started indulging into bootlegging activities. Under the circumstances, except the information received through the statement of two anonymous witnesses in respect to alleged incidents dated 20-4-99 and 15-4-99, no facts are apparent from the grounds of detention to the effect that in past proximate in time to the order of date of detention, the detenu was continuing his prejudicial activities of bootlegging.

##. That in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT AND OTHERS 1995 (2) GLR 1134, the Division Bench of this Court has expressed the view that non consideration of less drastic remedy available under Section 437(5) of the CrPC claiming cancellation of bail amounts to non application of mind which vitiates the subjective satisfaction, thus rendering the detention order bad in law. That the said view has been approved and endorsed in the proceeding of Letters Patent Appeal No : 1056 of 1999 decided on 15-9-99 by this Court (Coram : C.K.Thakker & A.L.Dave, JJ.).

12.1 In the instant case also, the grounds of detention is devoid of any fact from which it could be inferred or rational conclusion could be drawn that the detaining authority had considered the aspect of claiming of cancellation of bail if granted in the pending cases

against him.

12.2 In view of above stated discussion, it is difficult to accept the submission urged by the learned AGP and to hold that detention order does not suffer from vice of non application of mind.

##. The petitioner has also raised the contention vide para 10 of the petition that a representation dated 12-8-1999 was made to the detaining authority with request to forward the same to the State Government and till the date of filing of the petition, the detenu has not received any reply as such, the valuable right of the petitioner under Article 22(5) is violated and the continued detention is rendered illegal.

##. It may be noted that despite due service of rule, none of the respondents has filed any affidavit to controvert the facts averred in the petition.

##. In the matter of DHANIBEN M. TANDEL VS. UNION OF INDIA reported vide 1997(1) GLH 454, the division bench of this Court having relied upon the observations made by the Hon'ble Supreme Court in the matter of RAJENDRA VS. COMMISSIONER OF POLICE reported vide 1994 (Supplementary) 2 SCC page 716 has held that the Central Government is under obligation to file its counter within the time permitted by the Court, failing which, the case may go by default. Production of file is not a substitute for a counter to be filed by the Central Government.

15.1 In the instant case also, the learned AGP has requested this Court to look at the file in order to ascertain the fact whether representation alleged to have been sent on behalf of the petitioner / detenu was received and decided in due course by the concerned authority or not. In view of above stated proposition settled by the Hon'ble Supreme Court and followed by the Division Bench of this Court, practice of looking at the file having been deprecated, the Court is not inclined to look into the file as suggested by learned AGP.

##. As there is no affidavit in reply to controvert the averments made in the petition, supported by affidavit filed by one Smt. Raniben Hareeshbhai Bhil, I am constrained to hold that the representation forwarded on behalf of the petitioner / detenu has not been considered as required under Article 22(5) of the Constitution as soon as possible and thereby, the continued detention of the petitioner having become illegal, impugned order is required to be quashed and set aside.

##. On the basis of aforesaid discussions, the petition is allowed. The impugned order of detention dated 6-5-1999 passed by respondent No.1 - The Commissioner of Police, Ahmedabad City is hereby quashed and set aside. The petitioner - detenu - Haresh Karsan Bhil is ordered to be set at liberty forthwith if not required in any other case. Rule to the aforesaid extent is made absolute.

Date : 15-2-2000 [A.K.Trivedi, J.]

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